Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term,

No. 76-241

OCEAN SANDS HOLDING CORPORATION,
A Virginia Corporation,
Appelant,

V.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TAXATION,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

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No. _____

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a Virginia Corporation,

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PETITION FOR WRIT OF CERTIORI
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Appellant, Ocean Sands Holding Corporation, a Virginia Corporation, prays that a writ of certiori issue to review the judgment of the Supreme Court of Virginia rendered in the above styled case on 21 May 1976.

OPINIONS BELOW

A Judgment Order was filed by the Circuit Court of the City of Virginia Beach on October 3, 1975 and is Appendix A hereto. An Order affirming the judgment in favor of the Appellee was entered by the Supreme Court of Virginia on May 21, 1976 and is Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on May 21, 1976.

Appellant has no further remedy under the laws of the United States.

The jurisdiction of this Court is involked under 28 USC 1257.

QUESTION PRESENTED FOR REVIEW

Did the Virginia Statutes, Sections 58-441.28 (a) and 58-441.32, Code of Virginia, 1950, as amended, permitting issuance of a warrant and levy for a tax deficiency before a hearing violate the Fourteenth Amendment and is it inconsistent with the Rulings of the Supreme Court of

the United States in Laing v. United States, 44 Law Week, 4035; and United States v. Hall, 44 Law Week, 4035, and other decisions.

STATUTES INVOLVED

Section 58-441.28 (a), Code of Virginia, 1950, as amended:

Assessment Based on Estimate - In the event any dealer fails to make a return as provided by this chapter, or makes a grossly incorrect return, or a return that is false or fraudulent, it shall be the duty of the Commissioner to make an estimate for the taxable period of the retail sales or distributions of such dealer, or of the gross proceeds from leases of tangible personal property, or taxable services by such dealer, or the cost price of all articles of tangible personal property imported by such dealer for use or consumption in the State, or storage by such dealer of tangible personal property to be used or consumed in the State, and assess the tax, plus penalties. The Commissioner shall give such dealer ten days' notice in writing requiring such dealer to appear before him or an assistant with such books, records, and papers as he may require relating to the business of such dealer for such taxable period, and the Commissioner may require such dealer or the agents and employees of such dealer to give testimony or to answer interrogatories under oath administered by the Commissioner or his assistants respecting such sale, distribution, lease, use, consumption, or storage of tangible personal property, or taxable services, or the failure to make a return thereof as provided in this chapter. If any dealer fails to make any such return or refuses to permit

an examination of his books, records, or papers, or to appear and answer questions within the scope of such investigation relating to the sale, distribution, lease, use, consumption, or storage of tangible personal property, or taxable services, the Commissioner is hereby authorized to make the assessment based upon such information as may be available to him and to issue a warrant for the collection of any such taxes and penalties so found to be due. The assessment so made shall be deemed prima facie correct.

Section 58-441.36, Code of Virginia, 1950, as amended:

Tax Warrants.- The Commissioner is empowered, when any tax becomes delinquent under this chapter, to issue a warrant for the collection of the tax, penalty and interest from each delinquent taxpayer. Sections 58-41, 58-42 and 58-43 shall apply to such warrants, except that the same may be issued as soon as the tax becomes delinquent.

Section 58-441.32, Code of Virginia, 1950, as amended:

Jeopardy Assessment.- If the Commissioner is of the opinion that the collection of any tax or any amount of tax, required to be collected and paid under this chapter, will be jeopardized by delay, he shall make an assessment of the tax or amount of tax required to be collected and shall mail or issue a notice of such assessment to the taxpayer

together with a demand for immediate payment of the tax or of the deficiency in tax declared to be in jeopardy including penalties. In the case of a tax for a current period, the Commissioner may declare the taxable period of the taxpayer immediately terminated and shall cause notice of such finding and declaration to be mailed or issued to the taxpayer together with a demand for immediate payment of the tax based on the period declared terminated and such tax shall be immediately due and payable, whether or not the time otherwise allowed by law for filing a return and paying the tax has expired. Assessments provided for in this section shall become immediately due and payable, and if any such tax, penalty or interest is not paid upon demand of the Commissioner, he shall proceed to collect the same by legal process or,in his discretion, he may require the taxpayer to file such bond as in his judgment may be sufficient to protect the interest of the State. (1966, c. 151.)

Section 58-41, Code of Virginia, 1950, as amended:

Warrants for collection of taxes.- If any taxes or fees, including penalties and interest, assessed by the Department of Taxation or by the State Corporation Commission in pursuance of law against any person, firm or corporation be not paid within thirty days after the same become due, the Department in the first case or the Comptroller in the second case may issue a warrant, under the authority of the Commissioner or Comptroller, as

the case may be, directed to the sheriff of any county or to the sheriff or high constable of any city of the State commanding him to levy upon and sell so much of the real and personal property of the delinquent taxpayer, found within such officer's bailiwick, as may be necessary for the payment of the taxes and fees, including penalties, interest and the costs of executing the warrant and to return such warrant to the Department or Comptroller, as the case may be, and pay to the State Treasurer the money collected by virtue thereof, by a time to be therein specified, not more than ninety days from the date of the warrant. (1926, p. 975; 1928, p. 41; 1940, p. 378; Tax Code, Section 19; 1971, Ex. Sess., c. 155.)

Section 58-1130, Code of Virginia, 1950, as amended:

Application to court for correction of erroneous assessments of State taxes generally.- Any taxpayer, assessed with any tax administered by the Department of Taxation, aggrieved by any such assessment may, unless otherwise specifically provided by law, within two years from the thrity-first day of December in the year in which such assessment is made, apply for relief to the court in which the officer who made the assessment gave bond and qualified or to which or to whose clerk such bond and the certificate of his qualification was returned, or to the circuit court of the county or any court of record of the city in which such person resides, or in the case of a partnership or domestic corporation, the county or city in which it has its principal office in this State, or in the case of a

foreign corporation the county or city in which is located the office in this State at which claims against the foreign corporation may be audited, settled and paid.

If the assessment complained of was made by the Department of Taxation, a copy of the application shall be served on the State Tax Commissioner at least twenty-one days before the hearing.

STATEMENT OF THE CASE

The complainant, Ocean Sands Holding Corporation, filed a Motion to Quash a Warrant for The Enforcement of Collection of Taxes issued by W. H. Forst, State Tax Commissioner on the 8th day of January 1975, in the sum of $56,371.28, for alleged delinquent Virginia Sales Tax, which was served on the Complainant's registered agent on January 10, 1975, marked Appendix C; and to remove from the Judgment Lien Docket the Lien pursuant thereto; alleging that the said Warrant was not issued in accordance with the appropriate statutory provisions. No hearing has ever taken place on the merits of the lien. Subsequently, on the 7th day of February 1975, the Complainant filed a verified Petition wherein it was alleged that certain Notices of Assessment for Sales Tax for a period covering December 1967, through September 1971, were invalid (Appendix D.); and, in addition thereto, a portion of the assessments exceeded the statutory three year period of limitation; and alleging that the statutory provisions did not afford an

adequate remedy at law, praying for the entry of an order restraining and enjoining the Commonwealth of Virginia Department of Taxation from taking any further action pertaining to the assessments.

Pursuant to notice, the Motion to Quash and the Petition came on for ore tenus hearing in the Circuit Court of the City of Virginia Beach, Virginia on the 14th day of February 1975, before the Honorable Austin E. Owen, Judge of the Circuit Court of the CIty of Virginia Beach, Virginia, at the conclusion of which the Court overruled the Motion to Quash the warrant and denied the Petition for Injunctive relief, and transferred the matter to the law docket of the Court for further proceedings pursuant to Section 58-1130.

The Order appealed from, in accordance with the ruling of the Court, was entered on the 3rd day of October, 1975. Subsequently, on the 31st day of October 1975, the Complainant filed its Notice of Appeal and Assignments of Error, to which no Assignments of Cross-Error were filed by the respondent.

On 21 May 1976, the Supreme Court of Virginia, by judgment, denied a Petition of Ocean Sands Holding Corporation for an appeal. From the judgment, the Petitioner appeals.

FACTS MATERIAL TO THE QUESTION PRESENTED

1. On December 18, 1974, F. W. Lewis, Director of the Sales and Use Tax Division of the Virginia Department of Taxation mailed Notices of Assessment for the period of December 1, 1967 through September 30, 1974, totaling $56,371.28, including penalties, to Ocean Sands Holding Corporation, alleging that the same was a result of an "office audit", however, the covering letter stated that the assessments were based upon "information obtained from the United States Internal Revenue Service in their recent audit"; and further requesting that payment of that amount be made within ten days.

2. On January 8, 1975, the State Tax Commissioner caused a Warrant to issue for the collection of the taxes assessed on December 18, 1975, which was served on the Complainant on January 10, 1975, and docketed in the Judgment Lien Docket in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia, on January 10, 1975, which indicated that the sheriff levied on the real property owned by the Complainant in the City of Virginia Beach, Virginia on January 9, 1975, pursuant to a writ of fieri facias issued thereon.

3. Subsequently, on January 15, 1975, in reply to a request of one of the Officers of the Complainant, a letter was mailed by the Director of the Sales and Use Tax Division enclosing a copy of that Department's office audit working papers. A cursory review of the

"working papers" clearly discloses that the Sales and Use Tax Division took the average percentage increase in the IRS computation of gross receipts over the reported gross receipts and projected the same percentage increase for the remaining years covered by the Sales and Use Tax Department's supposed audit, a copy of the letter with the working papers attached thereto appears in the Appendix as "Exhibit E."

4. The federal questions sought to be reviewed were raised in the Supreme Court of Virginia as questions involved and supported by a brief. The Supreme Court of Virginia denied the Petition for Appeal (See Appendix "B").

5. For reference to questions being raised, see Brief of Ocean Sands Holding Corporation in the Supreme Court of Virginia, Page iii, 1, 8 and following to Page 16.

ARGUMENT FOR ALLOWANCE OF WRIT

It is submitted that the Warrant For the Enforcement of the Collection of Taxes was not lawfully issued, as it is violative of due process provisions of the Constitution of the United States Fourteenth Amendment and that the execution made pursuant thereto, the effect of which now appears as a lien in the principal sum of $56,371.28, together with accrued interest at the rate of 1 1/2% per month from December 18, 1974, against Complainants' real property, constitutes a taking of property without the procedural due process that is required by the Fourteenth Amendment.

From a review of the Statutes pertaining to Sales and Use Taxes, it appears that there are four authorizing statutes.

Section 58-41 provides, inter alia, for the issuance of a warrant after the procedure therein set forth has been followed. Accordingly, for the reasons herebefore set forth, no warrant could be lawfully issued pursuant to this section or Section 58-41, which presupposes a lawful assessment.

Section 58-441.36 empowers the Tax Commissioner to issue a warrant "when any tax becomes delinquent."

The imposition of taxes and levies is a "taking" within the meaning of the Constitution of the United States, and if the law under which property is assessed for taxes does not provide an opportunity for the owner to be heard and contest the justice of the assessment, he is deprived of his property without due process of law and the law is unconstitutional and void, and the assessment is void. Heth v. Radford, 96 Va. 272; Violet v. City of Alexandria, 92 Va. 561.

Forfeiture of rights and property cannot be adjudged by a legislative act, and confiscation, without a judicial hearing after due notice, would be void as not being by due process of law. 4 M.J. Constitutional Law, Section 136.

In the instant case, Ocean Sands Holding Corporation was assessed pursuant to Section 58-441.28, Code of Virginia, 1950, as amended. There was a warrant for collection of taxes due and penalties assessed, which is, in

effect, a judgment. A fieri facias was issued.

Thereafter, Ocean Sands Holding Corporation filed a Bill of Complaint, praying for an injunction and to quash the warrant and fieri facias. The trial court said that pursuant to Section 58-1158, Code of Virginia, 1950, as Amended, the Ocean Sands Holding Corporation had an adequate remedy at law and transferred the case to the law side. For reasons hereinbefore stated, this is a taking without due process of law. The Commissioner of Revenue has taken the property and the Statutes do not (underlining mine) provide for the Commissioner to proceed to any Court hearing to enforce its warrant or levy; as a matter of fact, the statute makes the assessment prima facie correct.

This procedure, which we all must agree is arbitrary and capricious, has been the subject of recent Supreme Court of the United States opinions in cases directly on point. On January 13, 1976, in the cases of Laing v. United States, and United States v. Hall, 44 Law Week 4035. The facts in Laing v. United States are that Laing was a citizen of New Zealand. He entered the United States on a temporary visitor's visa on May 31, 1972. On June 24, 1972, the United States custom authorities found $300,000.00 in United States currency. The IRS District Director found that Laing was intent upon placing the funds beyond the reach of the United States and seized the funds. This seizure was challenged as violative of due process both as to levy and distraint.

In the companion Hall case, the District Director notified Mrs. Hall

that because she was involved in illicit drugs, that it tended to prejudice or render ineffectual collection of income tax January 1, 1973 to January 30, 1973. Her 1970 Volkswagon was seized and offered for sale. She asked for an injunction to restrain the IRS from selling the automobile. The United States Court of Appeals (6th Circuit) affirmed the injunction, relying on Rambo v. United States, 492 F 2d, 1960, (1974).

The United States Supreme Court, speaking through Mr. Justice Marshall, held that even though jeopardy had been asserted and a finding of a "deficiency" by the IRS, the taxpayer should have the opportunity to litigate in the Tax Court. Mr. Justice Brennon concurring stated the following:

> "The 'root retirement' of the Due Process Clause is "that the individual be given an opportunity for a hearing before (italics his) he is deprived of any significant property interest..."

Ocean Sands Holding Corporation was deprived of its property before a hearing. There is no procedure requiring the Commissioner to bring an action to Court. The only statute applicable--(See Section 58-1142, Code of Virginia, 1950, as amended), provides for no injunctive relief. Under that statute, the burden is on the tax payer to bring an action. This type of action flies in the face of Laing and Hall. Ocean Sands Holding Corporation should be granted injunctive relief to comply with Due Process. The only way injunctive relief can be

granted is on the equity side of the Court under Rules of the Supreme Court of Virginia. For this reason and others cited hereafter, the trial court erred.

There appears a great number of decisions on the subject of what constitutes a denial of due process at both the State and Federal levels, some of which extend to state action, by state involvement at some stage of the controversy, in order to bring about the invoking of the Fourteenth Amendment guaranties.

A number of cases in this area include cases involving garnishment proceedings as failing to satisfy the due process requirements of the Fourteenth Amendment. In Sniadach v. Family Finance Corporation, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (June 1969), a garnishment action was brought by the Finance Company against Sniadach and her employer, pursuant to a Wisconsin statutory prejudgment garnishment procedure, by virtue of which the garnishor had ten days to serve the summons on the defendant, after service on the garnishee and the matter set for hearing at a subsequent date. During the period between the service on the garnishee and the subsequent hearing, the defendant's wages were frozen. The Court stated that such summary procedure could well meet the requirements of due process in extraordinary situations; citing Fahey v. Mallonee, 332 U.S. 245, 253-254, 91 L. Ed. 2030, 2038-2039, 67 S. Ct. 1552 and others; however, the Court stated that was no situation requiring special protection to the State or the creditor. In holding that the prejudgment garnishment procedure violated the fundamental principles

of due process, states at page 352:

> "In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitites 'right to be heard'."
>
> "In the latter case, (Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 873, 70 S. Ct. 652) we said that the right to be heard 'has little reality of worth unless one is informed and can choose for himself whether to appear or default, acquiesce or contest'."

And, at Page 354:

> "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (of Coe v. Armour Fertilizer Works, 237 U.S. 413, 423, 59 L. Ed. 1027, 1031, 35 S. Ct. 625) this prejudgment garnishment procedure violates the fundamental principles of due process."

If extraordinary circumstances existed, the Commissioner could have utilized the procedure prescribed in Section 58-441.32; however, no such circumstances existed, and accordingly, the present cause would not come within the exception referred to by the Court.

In a series of cases decided since 1969, the United States Supreme Court has held procedural due process requires the giving of notice and an opportunity for hearing before the state and/or a creditor, may deprive a debtor of any significant property interest, including temporary use and enjoyment. Exceptions to this principle are justifiable only in "extraordinary circumstances." (Fuentes v. Shevin, (1972), 407 U.S. 67, 90 (32 L. Ed 2d 556, 92 S. Ct. 1983.)

In applying this principle, courts have invalidated statutes providing for wage garnishment (Sniadach v. Family Finance Corp., (1969) 395 U.S. 337, (23 L. Ed. 2d 349, 89 S. Ct. 1820); McCallop v. Carberry, (1970) 1 Cal. 3d, 903 (83 Cal. Rptr. 666, 464, P. 2d 122), claim and delivery (Blair v. Pitchess, supra, 5 Cal. 3d 258), prejudgment attachment of checking accounts (Randone v. Appellate Department), 5 Cal. 3d 536; (96 Cal. Rptr. 709, 488 P 2d 13) and replevin of household foods (Fuentes v. Shevin, supra, 407 U.S. 67.)

The Supreme Court of California, in reliance upon these decisions, in Adams v. Department of Motor Vehicles, (April 1974) 11 C 3d 146 Cal. Rptr. 145, 520 P. 2d. 961, 64 ALR 3d, 803, which was an action pertaining to a garageman's lien and sale, at page 812 stated: "Because--- of the Civil Code permit involuntary sale and transfer of a vehicle without affording the owner an opportunity for hearing, they deprive owners due process of law and are, therefore, invalid."

While the cases referred to do not directly involve the question of taxation by a state authority, it is

submitted that the principals nontheless are applicable in the present instance, due to the fact that there is direct state involvement and there are no extraordinary circumstances to remove the issue from the generally stated principles. Accordingly, it is contended that the Warrant issued by the State Tax Commissioner, together with its subsequent effect, violated the procedural due process of law gauranteed by the Fourteenth Amendment of the United States Constitution.

It is submitted that the Supreme Court of Virginia by its ruling affirming the trial court has ruled in a way not in accord with applicable decisions of this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted and that the decision of the Supreme Court of Virginia be reversed on the grounds that the Statutes of Virginia are violative of the Constitution of the United States, or, in the alternative, to enjoin the Commonwealth of Virginia from asserting a warrant and lien against the property of the Appellant.

Respectfully submitted,

HOWARD I. LEGUM
Counsel for Ocean Sands
Holding Corporation

CERTIFICATE
OF
MAILING

I hereby certify that three (3) copies of the foregoing Petition For Writ of Certiori To The Supreme Court of Virginia were mailed this 18th day of August, 1976, to Andrew P. Miller, Esquire, Attorney General, Office of The Attorney General, 1101 E. Broad Street, Richmond, Virginia 23219.